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No. 02-813

In the Supreme Court of the United States

GREEN FIRE & MARINE INSURANCE CO., LTD., FKA KUKJE HWAJAE INSURANCE CO., LTD., PETITIONER

v.

M/V HYUNDAI LIBERTY, IN REM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Petitioner is the subrogee of a foreign cargo owner who contracted with a non-vessel-operating common carrier (NVOCC) to ship goods to the United States. The question presented is whether petitioner is bound by the forum-selection clause in the bill of lading that a shipowner issued to the NVOCC for transport of the cargo-owner's goods.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. Petitioner seeks review of a decision in which the United States Court of Appeals for the Ninth Circuit determined that a non-vessel-operating common carrier (NVOCC), as defined in the Shipping Act of 1984, 46 U.S.C. App. 1702(17)(B), acted as a cargo owner's agent in accepting a bill of lading from a shipowner. On that basis, the court of appeals concluded that the cargo owner was contractually bound by the forum-selection clause in the shipowner's bill of lading. The circuit conflict on which petitioner relies (Pet. 11-12, 22-27) is one subject of the pending petition for a writ of certiorari in *Norfolk Southern Railway* v. *James N. Kirby, Pty Ltd.*, No. 02-1028 (filed Jan. 6,

2003). In *Norfolk Southern*, the United States has filed a brief amicus curiae at the Court's invitation and suggested that the petition should be granted, but that the case should be resolved on grounds separate from the agency issue this case presents. The instant petition does not independently merit review by this Court. Accordingly, it should be held pending this Court's disposition of the petition in *Norfolk Southern* and then disposed of as appropriate in light of the final disposition of that case.

STATEMENT

1. Petitioner insured a lathe that a Korean company, Doosan Corporation (Doosan), manufactured and sold to a company in Michigan. Pet. App. 3; Pet. 3. Doosan contracted with Glory Express, Inc. (Glory Express) to ship the lathe from Busan, Korea, to Los Angeles. Pet. App. 3. Glory Express is licensed as an NVOCC by the Federal Maritime Commission. See *ibid.*; Pet. 4 & n.2; see also 46 C.F.R. Pt. 515.[1]

Glory Express issued Doosan three substantively identical bills of lading for containers holding the lathe. Pet. App. 3; see C.A. E.R. 138-143 (Glory Express-Doosan bills of lading). The bills of lading are contractual documents recording that Glory Express received

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[1] The Shipping Act of 1984 creates the statutory classification of "ocean transportation intermediary," which includes both "ocean freight forwarders" and NVOCCs. 46 U.S.C. App. 1702(17). Ocean freight forwarders arrange for shipments from the United States via common carrier "on behalf of shippers." 46 U.S.C. App. 1702(17)(A). NVOCCs operate and are regulated as common carriers, although they do not own the vessels used for transport. NVOCCs are defined as shippers in their relationships with vessel-operating common carriers. See 46 U.S.C. App. 1702(6) and (17)(B).

the goods from Doosan and "govern[ing] the relationship of the parties before delivery of the goods." 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* 60 (3d ed. 2001). The bills named Doosan as the shipper of the goods, the buyer of the lathe as the consignee, a ship called the Hyundai Liberty as the "exporting carrier," Busan as the port of loading, and Los Angeles as the port of discharge and place of delivery. Pet. App. 3; C.A. E.R. 138, 140, 142. The bills stated in part that

> [Glory Express] shall have the right at its sole discretion to use feederships, ferries, lighters, trucks, trains or planes, in addition to the Ocean Vessel or its substitute, to accomplish said carriage. If the goods are shipped from or are consigned to a port or place not directly served by [Glory Express]'s own vessel, * * * [Glory Express] will, acting only as the Shipper's AGENT, arrange for transportation of the shipment by other carriers from the place of shipment to the port of loading on [Glory Express's] vessel and from the port of discharge from [Glory Express's] vessel to ultimate destination, and during such segments of transportation the carriage, handling or storage of the goods shall be subject to the freight contracts and tariffs of such other carriers.

C.A. E.R. 139, 141, 143 (preamble). The bills further provided that "the [parties] agree that any suits against [Glory Express] shall be brought in the Federal Courts of the United States in the City of New York." *Ibid.* (Cl. 19).

Glory Express, acting through an agent, contracted with Hyundai Merchant Marine Co., Ltd. (Hyundai) to ship the lathe to California on the Hyundai Liberty. Pet. App. 3 & n.1; see C.A. E.R. 154-155 (Hyundai-

Glory Express bill of lading). The Hyundai-Glory Express bill of lading identified Glory Express's agent as the shipper and consignee of the goods, the Hyundai Liberty as the ocean vessel, Busan as the place of receipt of the goods, and Los Angeles as the port of discharge and place of delivery. *Id.* at 154. The bill stated that claims arising under it are governed by the law of Korea except as otherwise provided, and "[a]ny and all action concerning custody or carriage under this Bill of Lading whether based on breach of contract, tort or otherwise shall be brought before the Seoul Civil District Court in Korea." Pet. App. 4 (quoting C.A. E.R. 155 (Cl. 30)).

2. Petitioner alleges that Doosan's lathe was damaged during the sea voyage from Korea to Los Angeles. Pet. App. 4. Petitioner paid Doosan's insurance claim for the damage and brought admiralty actions in the United States District Court for the Central District of California against Glory Express in personam and the ship Hyundai Liberty in rem. *Ibid.*; see Fed. R. Civ. P. 9(h); *id.* Supp. R. Admiralty & Mar. Cl. B, C. Petitioner asserted causes of action for damage to cargo, breach of contract, negligence, breach of duty to care for property in bailment, and unseaworthiness. Pet. App. 4, 25, 36. The instant petition involves only petitioner's action in rem against respondent. See Pet. ii, 4-10.

a. In the action in rem, the respondent ship (represented by Hyundai as its owner, see Pet. App. 4 n.2) filed a motion to dismiss for improper venue. Respondent argued in its motion that, under the forum-selection clause in the Hyundai-Glory Express bill of lading, the action could be maintained only in Korea. *Id.* at 25, 36. The district court denied the motion. *Id.* at 23-33. It concluded in pertinent part that petitioner is not

bound by the forum-selection clause in the Hyundai-Glory Express bill of lading because, although Doosan was contractually identified as a party to the bill, see *id.* at 28-30, neither Doosan nor petitioner had taken any action demonstrating their acceptance of that bill and, in particular, petitioner had not sought to enforce the Hyundai-Glory Express bill in the in rem action. *Id.* at 30-32; see *id.* at 4-5 & n.3. The court stated that if petitioner subsequently "'accept[ed]' the Hyundai Bill of Lading by, for example, relying on its terms to establish an element of its claims, the Court would entertain a renewed motion to enforce the forum selection clause contained therein." *Id.* at 32; see also *id.* at 38-40 (denying motion for reconsideration).[2]

b. Petitioner and respondent filed cross-motions for summary judgment on the issue of respondent's liability. Pet. App. 17. The district court first rejected petitioner's argument that respondent's liability was established by the court's finding, in the in personam action, that Glory Express is liable to petitioner in the amount of $3000 under the Glory Express-Doosan bill of lading. *Id.* at 18-19. The district court observed that Glory Express, as an NVOCC, was a common carrier with respect to Doosan, but further stated that Glory Express was an agent of Doosan, "and thus merely a customer" of Hyundai, when it contracted for ocean carriage of Doosan's cargo on the Hyundai Liberty. *Id.* at 19 (quoting *Insurance Co. of N. Am.* v. *S/S Ameri-*

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[2] Respondent also filed a motion for partial summary judgment on the ground that the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. App. 1304(5), limits its in rem liability to $3000. See generally U.S. Br. at 2-3, *Norfolk S. Ry.*, *supra* (No. 02-1028) (discussing COGSA). The district court granted that motion. Pet. App. 5, 18.

can Argosy, 732 F.2d 299, 301 (2d Cir. 1984)). The court concluded that, because Glory Express's relationship with Hyundai was that of customer and carrier, Glory Express's liability under its own bill of lading did not extend to Hyundai, which issued a separate bill. *Ibid.*

The district court then addressed petitioner's argument that the Hyundai-Glory Express bill—which stated that respondent received goods from Glory Express in good condition, see C.A. E.R. 155 (preamble)—was prima facie proof of respondent's liability for damage to the lathe. Pet. App. 19. The court determined that petitioner's reliance on the Hyundai-Glory Express bill in making that argument constituted acceptance of the terms of the Hyundai-Glory Express bill. *Id.* at 20. In addition, the court determined that petitioner *had to* base its claim against respondent on the Hyundai-Glory Express bill, because, absent "unusual circumstances," *id.* at 21, "the liability of a carrier [*i.e.*, respondent] is determined by its own bill of lading even where the actual owner [of the cargo] and the shipper deal through the intermediary of an NVOCC," *id.* at 20.

The district court therefore denied petitioner's motion for summary judgment on the ground that petitioner had no cause of action other than a potential claim in Korea under the Hyundai-Glory Express bill. Pet. App. 21. The court dismissed all claims against respondent "without prejudice to Plaintiff's right to bring a claim that complies with the forum selection clause of the Hyundai[] Bill[] of Lading." *Ibid.*

3. The Ninth Circuit affirmed the district court's dismissal of petitioner's in rem action, but on different grounds. Pet. App. 1-16. The court of appeals first determined that petitioner's in rem action is a type of action subject to the forum-selection clause in the

Hyundai-Glory Express bill, *id.* at 7, and that requiring petitioner to sue in Korea would not violate COGSA, *id.* at 8.

Then, the court concluded that the forum-selection clause in the Hyundai-Glory Express bill is binding on petitioner because "the commercial role of an NVOCC, as well as the facts of this case, lead to the conclusion that Glory Express was acting as Doosan's agent when it accepted the Hyundai bill of lading." Pet. App. 8. The court noted that under the Shipping Act of 1984, an NVOCC like Glory Express "is a shipper in its relationship with an ocean common carrier." *Ibid.* (quoting 46 U.S.C. App. 1702(17)(B)). But the court further reasoned that "an NVOCC generally acts as the agent of the cargo owner/shipper when it contracts with the ocean carrier to ship the cargo owner's goods." Pet. App. 8-9.

The court of appeals found "[n]othing in the record [that] suggests that the relationship between Doosan and Glory Express deviated from that commercial norm" of principal and agent. Pet. App. 10. "To the contrary," the court continued, "the record shows that Doosan intended Glory Express to act as its agent for the purpose of shipping the lathe." *Id.* at 10 & n.5. The court emphasized that the Glory Express-Doosan bill of lading authorized Glory Express to arrange for carriage of Doosan's lathe and to use whatever mode of transportation Glory Express deemed appropriate for the trip from Busan to Los Angeles. *Id.* at 10; see p. 3, *supra.* The court further stated, however, that "the relationship between Glory Express and Doosan was [not] one of agent and principal for all purposes." Pet. App. 10 n.5. The court suggested that Glory Express could be considered a "special agent[] * * * authorized to conduct a single transaction or series of transactions

not involving continuity of service." *Ibid.* (citing William A. Gregory, *The Law of Agency and Partnership* § 7 (2d ed. 1990)).

Having determined that Glory Express acted as Doosan's agent in accepting Hyundai's bill of lading, the court concluded that Doosan, and petitioner as its subrogee, are bound by that bill's forum-selection clause. Pet. App. 11. Thus, in the court of appeals' view, the district court should have dismissed the case "at the outset of the litigation" for lack of jurisdiction. *Ibid.* For those reasons, the court affirmed the district court's dismissal of the in rem action. *Id.* at 15.[3]

DISCUSSION

THE PETITION SHOULD BE HELD FOR *NORFOLK SOUTHERN RAILWAY CO.* v. *JAMES N. KIRBY, PTY LTD.*, NO. 02-1028, AND THEN DISPOSED OF AS APPROPRIATE IN LIGHT OF THE FINAL DISPOSITION OF THAT CASE

A. *Norfolk Southern* And The Instant Case Present A Common Issue On Which The Circuits Disagree

The pending petition in *Norfolk Southern Railway Co.* v. *James N. Kirby, Pty Ltd.*, No. 02-1028 (filed Jan. 6, 2003), involves the issue whether a foreign cargo owner who shipped goods to an inland destination in the United States using a shipping intermediary was bound by liability limitations in the intermediary's bill of lading, or in the bill of lading that a subcontracting

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[3] In the in personam action against Glory Express, the court of appeals affirmed the district court's determination that COGSA does not bar the enforcement against petitioner of the limitation on carrier liability in the Glory Express-Doosan bill of lading. Pet. App. 12-15. That aspect of the court of appeals' decision is not at issue in this Court.

ocean carrier issued to the intermediary, when suing a railroad that subcontracted with the ocean carrier to deliver the goods to their destination. Question 1 of the *Norfolk Southern* petition is "[w]hether a cargo owner that contracts with a freight-forwarder for transportation of goods to a destination in the United States is bound by the contracts that the freight forwarder makes with carriers to provide that transportation." Pet. at i, *Norfolk S. Ry.*, *supra* (No. 02-1028).

As the United States explains in its brief amicus curiae in *Norfolk Southern* (at 7-8), the Eleventh Circuit's decision in that case conflicts with the Ninth Circuit's decision in this case, and with decisions of the Second and Third Circuits, as to the nature of the relationship that is presumed to exist between a cargo owner and a shipping intermediary that arranges for physical transport of the cargo, when contract provisions and the surrounding circumstances do not clearly establish agency *vel non*. The Second, Third, and Ninth Circuits presume an agency relationship in that situation. See Pet. App. 8-10 (recognizing "commercial norm" that NVOCCs contract with shipowners as agents of cargo owners); *SPM Corp.* v. *M/V Ming Moon*, 22 F.3d 523, 527 (3d Cir. 1994) ("under COGSA, the carrier treats the NVOCC as the customer's agent, although the customer treats the NVOCC as a carrier"); *Insurance Co. of N. Am.* v. *S/S American Argosy*, 732 F.2d 299, 301 (2d Cir. 1984) ("With respect to the vessel and her owner, * * * the NVOCC is an agent of the shipper, and thus merely a customer."). The Eleventh Circuit articulated a conflicting rule in the *Norfolk Southern* case, stating that "special particular arrangements" are necessary to demonstrate that a shipping intermediary is acting as an agent of the shipper, rather than as an independent contractor.

James N. Kirby, Pty Ltd. v. *Norfolk S. Ry.*, 300 F.3d 1300, 1306 (11th Cir. 2002); see *id.* at 1305 (intermediary "acts as an agent when its role is merely to arrange a contract between the cargo owner and the ocean carrier"); see also *id.* at 1307 n.9 (discussing regulatory status of intermediary in that case).

In response to this Court's invitation in *Norfolk Southern*, the United States has suggested that the petition in that case should be granted. See U.S. Br. at 7-20, *Norfolk S. Ry.*, *supra* (No. 02-1028). We have further suggested that the Court resolve that case on grounds other than the agency issue that is the subject of the petition for a writ of certiorari in this case. See *id.* at 16-20. Finally, we have suggested that, if the Court does address the agency issue in *Norfolk Southern*, its analysis should consider the Shipping Act of 1984, 46 U.S.C. App. 1701 *et seq.*, including the Act's provisions specifying that, although NVOCCs operate and are regulated as common carriers, they are shippers in their relationships with vessel-operating common carriers. See 46 U.S.C. App. 1702(6) and (17)(B). If the Court does address the agency issue in *Norfolk Southern*, then its decision may determine the correct resolution of the agency issue in this case.

B. The Ninth Circuit's Decision In The Instant Case Does Not Independently Warrant Review

As explained, the *Norfolk Southern* case, even if reviewed by this Court, may not provide an occasion to address the agency issue on which the courts of appeals disagree. Despite that possibility, the United States does not recommend granting certiorari on the agency issue in the instant case.

In the first place, if the Court does grant review in *Norfolk Southern*, its resolution of that case on the

grounds suggested by the United States could render the present conflict among the courts of appeals on the agency issue far less significant, particularly in the context of determining carrier liability. See U.S. Br. at 16-19, *Norfolk S. Ry.*, *supra* (No. 02-1028).[4] Indeed, if the judgment of the Eleventh Circuit is reversed, the circuit conflict, which petitioner cites (Pet. 10) as one of two reasons for this Court's review, might be eliminated altogether. The Eleventh Circuit is the only Circuit that has rejected the rule adopted by the Second, Third, and Ninth Circuits. Eleventh Circuit law was unsettled on the agency issue before *Norfolk Southern*, see Pet. 22-23, and *Norfolk Southern*'s holding on that issue has not been adopted in any more recent Eleventh Circuit decision.

In addition, the court of appeals determined in this case, after reviewing the particular provisions of the relevant bills of lading, that "Doosan intended Glory Express to act as its agent for the purpose of shipping the lathe." Pet. App. 10; see also *id.* at 11 ("[I]n this case Glory Express, consistent with th[e] commercial norm, was acting as Doosan's agent when it accepted the Hyundai bill of lading."). If this Court were to grant the petition, the parties likely would disagree whether the court of appeals correctly construed the provisions of the Glory Express-Doosan bill of lading. Compare Pet. 8 (arguing that there was no record evidence to support court's agency finding), with Br. in

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[4] Most often, the agency issue arises in connection with the amount of liability or indemnification obligations under a bill of lading. See, *e.g.*, *Norfolk S. Ry.*, 300 F.3d at 1304-1307 (liability); *M/V Ming Moon*, 22 F.3d at 525-527 (indemnification); *S/S American Argosy*, 732 F.2d at 301-302 (liability); *Naviera Neptuno S.A.* v. *All Int'l Freight Forwarders, Inc.*, 709 F.2d 663 (11th Cir. 1983) (liability).

Opp. 2-3 (arguing that "[a]mple evidence exists in the record to support the Ninth Circuit's finding that Glory Express was acting as Doosan's agent"). The Glory Express-Doosan bill contains at least one provision—stating that Glory Express would serve as Doosan's agent in arranging certain transportation, if Glory Express's own ships were not available—that is not customary in an NVOCC's bill of lading (as NVOCCs by definition are not vessel operators), and that might implicate case-specific issues under the Shipping Act. See p. 3 (quoting bill language) & note 1 (discussing Shipping Act), *supra*. On the other hand, the court of appeals determined based on the record that "the parties intended that Glory Express would be independently liable, to some extent, for loss or damage to the lathe that occurred during shipping." Pet. App. 10 n.5. Those contract-specific issues were not briefed in the court of appeals. See Pet. 8-9. Accordingly, this case may not cleanly present the question on which the courts of appeals disagree—that is, whether, *absent case-specific factors indicating agency*, an agency relationship exists between a shipping intermediary (especially an NVOCC) and a cargo owner when the intermediary arranges with a shipowner for transport.

An additional consideration also contributes to making this an imperfect vehicle for the Court's possible review of the agency question. Although the court of appeals determined that the district court was late in dismissing petitioner's complaint and did so "for the wrong reason," Pet. App. 12, the court of appeals never addressed whether the district court's acceptance theory provides a valid alternative rationale for dismissal. The acceptance theory is a ground on which respondent could attempt to defend the court of appeals' judgment in this Court, and it might complicate

the Court's consideration of the agency issue. See *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 364 (1994) ("A prevailing party need not cross-petition to defend a judgment on any ground properly raised below."); cf. *El Paso Natural Gas* v. *Neztsosie*, 526 U.S. 473, 479 (1999) ("Absent a cross-appeal, an appellee may urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court.").

CONCLUSION

The petition should be held pending this Court's disposition of the pending petition in *Norfolk Southern Railway Co.* v. *James N. Kirby, Pty Ltd.*, No. 02-1028 (filed Jan. 6, 2003), and then disposed of as appropriate in light of the final disposition of that case.

Respectfully submitted.

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